APPENDIX

DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

No. 12,631 Criminal

UNITED STATES OF AMERICA

v.

BERNARD BUFORD CARTER

Opinion of the Court

The defendant B. B. Carter moves the Court to allow him to withdraw a plea of guilty entered and upon which sentence has heretofore been passed.

On the 17th of January, 1951, the movant, B. B. Carter, accompanied by his attorneys, Walter G. Russell and Arthur Glover, appeared in Court along with the District Attorney and his assistant and entered a plea of guilty to an information filed charging him with wilfully and unlawfully attempting to evade a large portion of the income tax due and owing by him to the United States of America.

The Court received the plea and listened to the statement of counsel and assessed a penalty by entering a fine of $10,000.00 which was promptly paid.

The defendant Carter, after a lapse of more than three years, now comes to Court and says that he was caused to enter the plea of guilty by the fraudulent representations made to him by his attorneys and by the District Attorney and his assistants and that he was not guilty as charged and should not have entered a plea of guilty but for being misled by those who presented his case in Court.

B. B. Carter, a tenant farmer on the Plains of Texas, during the seasonal and profitable years in producing grain, came in contact with a Mr. Price and his family who operated a bank at Stratford. Price had large areas of land under his control. Price testified that Carter handled it successfully and established a credit with his bank of as much as $300,000.00.

After he had operated the farm for some time his banker called his attention to the fact that he had better look to his income tax reports, since large sums of money were passing through his account, and referred him to Walter Russell of Amarillo as a proper and competent accountant to make up his income tax.

The defendant Carter kept no books; his bank books, his canceled checks, his deposit slips and his memory are the source of information from which the reports were made. On one occasion the banker Price in conversation with accountant Russell called Russell's attention to gossip among the employees of his bank in which some of the young lady employees in the bank had observed that Carter, with all the money he was handling, was not paying any larger income tax checks than they were paying.

Russell says he thought about this some time and on one occasion in conversation related it to United States Revenue Agent Dubbs. The record does not disclose that Russell disclosed any facts and figures to the agent, but he called his attention to the reports and gossip.

Defendant Carter with newly employed counsel says that the purpose of Russell was a deep laid scheme to get his client Carter into trouble for the purpose of representing him and collecting a large fee.

Russell says that he worried about the matter and decided it was his duty to report the matter to the government, and in support of such he submits the reasoning

of Wigmore and others on the subject of privileged communication:

"Its benefits are indirect and speculative; its obstruction is plain and concrete . . . It is worth preserving for the sake of general policy; but it is none the less an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its general principle." (Wigmore on Evidence, Second Edition, Vol. 5, Sec. 2291).

"If he is employed as an attorney in any unlawful or wicked act his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare." (Annesley v. Earl of Anglesia, 17 How. St. Tr. 1229).

On the question of actual fraud, the Court must consider the deductions sought to be made that Russell reported his client for personal gain in order to collect a large fee. We must consider further Russell's statement that he considered it his duty. Then there may have been other elements that entered into the mind of Russell, such as fear of public opinion resulting from gossip, that induced him to report his client to the agent. We can only arrive at the purpose of Russell by considering it in the light of the rules that control circumstantial evidence, the question being did his conduct amount to actual fraud.

Some years or more went by and another agent of the government, becoming possessed of the statement that had been made to Dubbs, made an investigation of the income and tax liability of the defendant Carter. This investigation seems to have been rather an extended one and all the facts and figures assembled by such investigation together with all the reports that had heretofore been made by defendant Carter were mailed ostensibly from one

department of the government to another. Instead of being delivered to the government office as desired, by some error they were delivered to the mail box of the defendant Carter. He got it out and found it to be a report touching on his income tax status. One of the first passages in the report advised him that the report stemmed from information originally obtained from his accountant, Walter G. Russell. He says he studied the report for a day or more or maybe into the night and confronted Russell with it, that he and Russell then discussed what they were going to do with it. He says that Russell told him to burn it up, but to first make a copy. The defendant did have his daughter to make several copies and then he himself studied the contents of the report of the revenue agent. He did not burn the original nor the income tax report and he and Russell discussed the matter as to whether the government could prosecute him without the evidence, and all the evidence was there in their possession meaning principally the various income tax reports.

In course of time Carter was advised that the government intended to submit his record for prosecution on the basis of being wilfully guilty of attempting to conceal or defraud in the payment of his taxes. This letter was discussed between Carter and his counsel Walter G. Russell. Carter also discussed his tax situation with another attorney, Byron Singleton.

Carter and Russell agreed that it would now be necessary to employ counsel to defend him against the criminal charges brought by the government. After discussion it was agreed between him and Carter that Russell's firm would undertake the defense. A young attorney, Arthur Glover, was called into the conference and it appears that Glover was to be the Courthouse or trial lawyer in handling the case. A fee of $10,000.00 was arranged and $5,000.00 of it paid. In the ultimate division of the fee, Russell received for his part one-half of the total.

In reporting Carter to the United States Revenue officer, we are not prepared to say that Russell had in mind a long range scheme to defraud in ultimately collecting the fee that he finally received. Such conclusion can only be reached by circumstantial evidence, and some two or three other motives or purposes are just as tenable as the one presented. We do not think that it can thus be established by circumstantial evidence that the report made to the revenue officer, although unethical as it may have been, can be sustained under the rules of circumstantial evidence to establish actual fraud. However, if Walter G. Russell made the report to the revenue agent on his client because he felt that it was his duty to his government as a citizen and having been a former revenue officer himself, we think he could have done so believing and feeling that it was his duty. But having turned in his client to be prosecuted by the government because he felt it was his duty to do so, we cannot understand how he felt free to accept employment to defend him.

It might be said to the credit of his associate, Arthur Glover, that Russell at the time that they accepted the employment did not disclose to Glover all of his previous dealing with Carter nor did he say anything about the government files falling into his and Carter's hands. We do not feel that Russell was free to accept this employment as a lawyer and we believe that there be lawyers in the profession who if confronted with this situation would as a matter of good conscience have returned at least his half of the fee, the amount of $5,000.00, to his client.

Glover went ahead with the case and after he had worked on it perhaps a year or more Carter told him about the secret investigation papers which he had hidden in his possession. Up to this time neither Carter nor Russell had done so. Glover continued to work on the case and to all appearances from the papers he prepared they were offered in evidence and from his general management and

conduct in the matter he endeavored to give the defendant Carter conscientious and capable service.

"Actual fraud is intentional fraud . . . it consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed" . . . 37 CJS 210.

"Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud."

For the reasons above stated tested by the rules of circumstantial evidence in arriving at the purposes and motives of men, we are unable to find that there is actual fraud in the case.

The question of legal or constructive fraud, however, is a more serious question. But before passing upon that we might observe two other elements which enter into this case.

First, Walter Russell and B. B. Carter had equal knowledge of what they were about to do. Together they had made up the income tax reports. Together they had concealed the government file. Together they had consulted about an attorney to defend the case. We are impelled to the conclusion that Carter knew everything that Russell knew.

"Where the parties deal upon equal terms, one who has failed to avail himself of means of knowledge readily within his reach cannot as a rule complain of the other party's representations, and this is especially true where the falsity of representations is obvious" . . . 26 CJ 1149, Sec. 68.

"One can secure no redress for a representation which he knew to be false" . . . 26 CJ 1135, Sec. 55.

It is true that Carter was not a lawyer or a banker or a college man, but he had business sense and understanding. According to the report which was submitted undeniedly at the time of his plea of guilty, he had taken large checks coming in to him and indorsed them over for payment of tracts of land so that there would be no trace of any record in his possession or perhaps in his bank's possession of his having received such money as a portion of income. And in this way large sums of money had escaped taxation. He understood how to do these things. He had built up a credit with his bank of some $300,000.00. He had prospered. He argued long and understandably with his counsel on the better course to pursue and finally agreed with them to enter a plea of guilty and throw himself upon the mercy of the Court.

The information to which he entered his plea of guilty consists of six counts, the first of which charges that on or about March 15, 1945, that one Bernard Buford Carter did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America.

Count 2 in similar language presented a charge that he did wilfully and unlawfully attempt to evade the tax of Mrs. Tommie Velma Carter.

Count 3 charges that about March 10, 1947 that he did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due.

Count 4 was one where a similar charge was made of an attempt to evade the income tax due by his wife.

Count 5 charges that about March 15, 1948 he did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due.

Count 6 charges that on or about March 15, 1948 he did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due and owing by him.

According to the weight of the testimony, this was gone over with Mr. Carter and the District Attorney. He did enter then into Court in company with his counsel and a plea of guilty was entered.

We cannot conclude from the facts and attending circumstances that he was unable to understand or comprehend just what he was doing. We believe that he did. We believe that the defendant Carter and counsel Russell equally understood everything they had done and that was being done.

Another element in the matter that we feel should be considered was the long delay in presenting this motion to withdraw his plea. Why should it have taken him better than three years to discover that his lawyers had dealt unfairly with him?

A motion of this type is presented to the sound discretion of the Court. The Court, however, must be careful not to abuse such discretion. U.S. vs. Vidaver, 73 F Supp 382.

We feel that in the exercise of his discretion in matters of this kind where an injury has been done that it would be the duty of the Court to restore the parties as nearly as might be to the position they occupied before the date of the alleged injurious transaction. Where time intervenes so that the Court cannot make such restoration, then the very purpose of making such restoration may be unjust to other parties, to even third parties. If there was a wrong done, the wrong lay between Carter and his counsel. The United States Government was a very important party to this matter and the status of the government cannot be now restored to where it was three years ago when this plea of guilty was made.

". . . in order to excuse an otherwise unreasonable delay in seeking relief . . ., the fraud must have been actual and not merely constructive" . . . 21 CJ 245.

". . . changes occur in the subject matter of the transaction in suit or in the relative positions of the parties thereto, as a result of which it is impossible to place the parties in status quo, and the enforcement of the right would work inequity, relief will be denied because of laches." 21 CJ 231.

By allowing a matter to rest three years the limitation runs on the government's claim for taxes and the government's witnesses may become unavailable.

Had this motion been made within a reasonable time before the status of the parties had undergone this change, we believe that it would have presented an altogether different appeal to the Court, but as the matter now stands we think it well nigh impossible to restore all parties to their former status and we feel that in the exercise of the Court's discretion in this matter he should be motivated and ruled to a large measure by the same principles of equity that would control in a civil controversy.

The Court exonerated the District Attorney's office of any fraud or wrongdoing, which the defendant Carter and counsel agreed to be correct.

It should be borne in mind that the controversy is not to dispose of a matter between Russell and Carter, but rather between Carter and the United States.

The motion to withdraw the plea of guilty must be denied because of the unreasonable delay.

(Signed) T. WHITFIELD DAVIDSON,
United States District Judge.

Opinion rendered October 30, 1954.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,467

B. B. CARTER, *Appellant*,
v.
UNITED STATES OF AMERICA, *Appellee*.

Decided June 30, 1955

Appeal from the United States District Court for the Northern District of Texas.

Before Hutcheson, Chief Judge, Jones, Circuit Judge, and Wright, District Judge.

Per curiam:

On January 17, 1951, appellant entered a plea of guilty to each count of an indictment in six counts charging an attempt to evade his and his wife's income taxes for the years 1944, 1946, and 1947. The total evasion for those years amounted to $30,677.88. He was sentenced to pay a fine of $10,000. In April, 1954, appellant filed a motion under Rule 32(d), Fed. R. Crim. P., to withdraw his plea of guilty entered January 17, 1951 on the ground that he was improperly advised and misrepresented by his counsel at the time of the entry of the plea.

The district court denied the motion, holding that at the time of entry of the plea Carter's counsel "rendered conscientious and capable service" and that Carter "understood and comprehended just what he was doing."[1] The

[1] The opinion of the district court reads in part:

"It is true that Carter was not a lawyer or a banker or a college man, but he had business sense and understanding. According to the report which was submitted undeniedly at the time of his plea of guilty, he had taken large checks coming in to him and indorsed them over for payment of tracts of land so that there would be no trace of any record in his

court also held that Carter waited until the statute of limitations barred further prosecution in the matter before filing his motion, appellant having contended in the district court that he was misrepresented by his lawyers not only in entering his plea of guilty but also in agreeing to prosecution by information rather than by indictment.

The record shows that Carter had two lawyers, both of whom were also accountants, representing him at the time he entered his plea of guilty. In addition, by some fortuitous but singularly suspicious circumstance, Carter received in the mail prior to entering his plea, the original copy of the Confidential Report of the Bureau of Internal Revenue, on which report his prosecution was based. This report contained all of the evidence on which the Government depended for conviction had Carter gone to trial.

After Carter pleaded guilty and paid his fine, he retained still a third lawyer to represent him in connection with his tax affairs. Carter's present counsel account for the fact that Carter's third lawyer did not seasonably move to withdraw Carter's plea of guilty by charging him with incompetence. Carter's present counsel also deny that they purposefully waited until the statute of limitations had run on the offenses charged before filing their motion to withdraw his plea of guilty, although it is a fact that the motion was filed within thirty days after the statute had run. After some apparent reservations about the matter, they do finally admit, however, in their reply brief filed after argument of the case on appeal, that their real purpose in attempting to set Carter's conviction aside is to

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possession or perhaps in his bank's possession of his having received such money as a portion of income. And in this way large sums of money had escaped taxation. He understood how to do these things. He had built up a credit with his bank of some $300,000.00. He had prospered. He argued long and understandingly with his counsel on the better course to pursue and finally agreed with them to enter a plea of guilty and throw himself upon the mercy of the Court."

improve Carter's chance of obtaining a tax refund for the years in question.

The motion to withdraw plea of guilty under Rule 32(d) is directed to the sound discretion of the district court. *Mitchell v. United States*, 5 Cir., 179 F. 2d 305. After sentence, it should be granted only "to correct manifest injustice."[2] Rule 32(d) Fed. R. Crim. P. We are unable to find that the district court here abused its discretion in refusing to grant the motion. On the contrary, we find in the record no proof of manifest injustice requiring the permission to withdraw the plea. Carter was better prepared to protect himself on arraignment, and more informed, than most defendants. He not only had two lawyers who, according to the district court, rendered "conscientious and capable service" but also a complete outline of the Government's evidence against him as contained in the Bureau of Internal Revenue's Confidential Report. He was certain a jury would convict him. So he pleaded guilty and threw himself on the mercy of the court. The court compassionately imposed only a fine where under the law and under the circumstances of the case a prison sentence as well could easily have been imposed. Now he asks this court to find that the district court abused its discretion in refusing to let him withdraw his plea of guilty so that he can plead the statute of limitations against further prosecution, or in the alternative, reclaim some of the taxes and penalties he has been required to pay.

We find no abuse of discretion.

Affirmed.

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[2] Rule 32(d) reads:

"(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Judgment

Extract from the Minutes of June 30, 1955

No. 15467

B. B. CARTER

VERSUS

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Order Denying Rehearing

Extract from the Minutes of August 12, 1955

No. 15467

B. B. CARTER

VERSUS

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.